In the Supreme Court

of the

United States

October Term 1972

No. 71-1442

ROLAND V. COLGROVE,

Petitioner,

vs.

JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA,

Respondent.

Brief of Respondent on Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

Petition for Certiorari Filed May 4, 1972
Certiorari Granted October 10, 1972

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent

Of Counsel for Respondent:
Dale F. Galles
Harwood, Galles, Gunderson
& Beiswanger
400 Electric Building
Billings, Montana 59101

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JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA,

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Brief of Respondent on Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

QUESTION PRESENTED

The District Court of the United States for the District of Montana promulgated its district court *Rule 13(d)(1)* prescribing a jury of six persons for the trial of civil cases, which rule became effective *September 1,* 1971.

Petitioner requested a mandate from the Ninth Circuit Court declaring the rule void and invalid as an invasion of a federal constitutional guarantee to a jury of twelve persons in civil actions. The Ninth Circuit Court in a written opinion reported at *456 F(2) 1370* denied the request, and upheld the constitutional validity of the district court rule. Petitioner petitioned for a Writ of Certiorari to review the judgment of the Ninth Circuit Court which this court granted on *October 10, 1972*. Accordingly, the question presented is the constitutional validity of a rule promulgated by a District Court of the United States prescribing a jury of six persons for the trial of civil cases.

STATEMENT OF POSITION

Neither the federal Constitution, nor any federal statute, nor any rule of Federal Civil Procedure, nor any rule of the Supreme Court of the United States spells out a requirement that a jury in a civil action shall consist of twelve persons, nor prevents nor precludes a district court from promulgating a rule of procedure requiring a jury of six persons in such cases.

When the constitutional language of the *Seventh Amendment* is placed in its proper perspective in light of the historical background in which the first seven Articles of our Constitution were promulgated at the First Constitutional Convention, and in light of the historical background in which *Amendments 6* and *7* were

promulgated by the First Congress; when we give proper and adequate consideration to the language of those decisions of the Supreme Court of the United States which have construed the scope of the *Seventh Amendment* in other areas; and when the language of the Constitution, its historical background, and the language of the decisions of our Supreme Court which have construed the scope of the *Seventh Amendment* are all placed in proper perspective with the decision of this court in *Williams v. State of Florida, June 22, 1970, 399, U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* the rule of the District Court of the United States for the District of Montana prescribing a six-man jury in civil cases is a valid and subsisting rule of procedure, and the decision of the Ninth Circuit Court should be affirmed.

LANGUAGE OF OUR UNITED STATES CONSTITUTION AND ITS HISTORICAL BACKGROUND

We do not have available locally the debates of the original constitutional convention. We do have, however, the writings of numerous historians and, in particular, the Federalist Papers published by Alexander Hamilton. Hamilton's *Federalist Paper 83,* published *May 28, 1788,* confirms the other historians we have read that the provision for trial by jury in criminal cases was considered a burning necessity, and that it was also considered desirable to have trial by jury in

civil cases as an excellent method of determining questions of property under proper regulation *(Lodge's Federalist, page 521)*. The great difference in jury practice among the several states made promulgation of a proviso that was satisfactory to all concerned an extremely difficult matter. A proposal was made by Pennsylvania that "trial by jury shall be as heretofore"; and by Massachusetts for trial by jury in actions at common law "if the parties requested it". Both were defeated. We understand that two modifications were proposed when the Committee on Style submitted its final draft to the convention on *September 12, 1787*, one of which was a specific provision for jury trials in civil cases. It was neither accepted nor rejected, but was returned to the Committee on Style to provide such a clause for consideration. The historians indicate that the failure to include any proviso thereafter in the original seven articles of the Constitution was not because of any disagreement concerning its advisibility, but because (1) the delegates were then ready to go home; (2) the difficulties in drafting a general rule that would satisfy all states because of the variety of court practices in the different states; (3) there was some fear among convention leaders that prolonged and protracted dispute and debate over the issue might very well devastate the agreement that had already been arrived at; (4) the delegates had fulfilled the burning necessity for preserving the right of jury trial in all

criminal cases; and (5) last, but not least, the responsible delegates felt that there was no danger in leaving the drafting and determination with respect to civil cases for Congress to promulgate in the future under the powers vested in Congress in *Article I (8)* along with the judicial powers vested in such inferior courts as might be created by Congress from time to time as provided in *Article III.* *Article I (8)* provides that Congress shall have power:

> "To constitute tribunals inferior to the Supreme Court. *(Clause 9)*

Article III, paragraph 1, vests judicial power in the one Supreme Court of the United States:

> "and such inferior courts as the Congress may from time to time ordain and establish."

Article III likewise expressly provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; * * *".

We find additionally significant to our problem the Necessary and Proper Clause of *Article I (8)* which vests power in Congress:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution and the government of the United States, or in any department or officer thereof." *(Clause 18)*

None of the foregoing language of the original seven articles of the original Constitution has ever been altered, changed, nor disturbed in any manner.

Federalist Paper 83 by Alexander Hamilton was published *May 28, 1788,* between adjournment of the original convention and the convening of the First Congress pointing out that the most severe criticism of the first seven articles of the original Constitution heard in New York, and perhaps on all other states, was "relative to the want of the constitutional provision for the trial by jury in civil cases." Many persons feared that by the failure of the Constitution to include such a provision, it was abolished. Hamilton tried to allay such fears in *Paper 83.*

> "A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or to let it alone. * * *" *(Pp. 518, Lodge; Pp. 357, Beard)*

We add in addition to the power granted to constitute the courts. the supplementary power vested in Congress by the "Necessary and Proper" *Clause 18 of Article I (8)* coupled with the express vesting of judicial power by *Article III* in all cases in law or equity in such inferior courts as the Congress may from time to time ordain and establish. Hamilton also stated:

> "The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails. * * * It is conceded by all

reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutatory point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature." *(Lodge, Pp. 531-532)*

It seems historically clear that the delegates desired to preserve the right of trial by jury in both civil and criminal cases; but a plan that would define the precise consistency of juries that would satisfy all delegates, and all states, could not be drawn up. For that reason, the Constitution required that the right of trial by jury be preserved, but the plan for the consistency of juries was left to the Congress to legislate from time to time as needs might require.

The omission of any language in *Amendments 6* and *7* adopted by the First Congress in *1789* which would spell out or prescribe the number of jurors carries great significance when viewed in the light of that historical background.

"AMENDMENT 6

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and

to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

"AMENDMENT 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

SIGNIFICANT CASES WHICH HAVE CONSTRUED THE SEVENTH AMENDMENT

The language of Supreme Court decisions which have construed the scope of the *Seventh Amendment* in other areas is significant.

In an opinion by *Justice Brandeis* in *Ex Parte Peterson, 1920, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919,* it was said with respect to the *Seventh Amendment:*

"The command of the Seventh Amendment that the right of trial by jury shall be preserved; does not require that old forms of practice and procedure be retained (citing cases * * *). New devices may be used to adapt the ancient institution (jury trial) to present needs and to make of it an efficient instrument in the administration of justice. Indeed such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that ultimate determination of issues of fact by the jury be not interfered with." *(309-310, U.S.; 546, S. Ct.; 923-924, L.Ed.)*

In *Gallowoy v. United States, 1943, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458,* the Ninth Circuit Court had affirmed the granting of a motion for directed verdict. With respect to such procedure under the *Seventh Amendment* the Supreme Court said in part:

> "The (Seventh) Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevalent, including the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common law rules on procedural matters among the states, and between them and England. * * *" *(390-392, U.S.; 1087-1088, S.Ct.; 1471, L.Ed.)*

In *Byrne v. Matczak, 3rd C.C., 1958, 254 F.2d 525, cert. den., 358 U.S. 816, 79 S.Ct. 24, 3 L.Ed.2d 58,* a District Judge permitted a trial jury to disperse during deliberations, go to their homes, and return to their deliberations after a night of rest. It was argued that traditionally at common law the trial jury had to be held intact while deliberating, and the failure to do so violated the right of trial by jury as guaranteed by the *Seventh Amendment.* In rejecting such contention, the court said:

> "True, the allowance of a dispersal is contrary to the old common law. And there is, in Dimick v. Schiedt, 1935, 293 U.S. 474, 55 S.Ct. 296, 79

L.Ed. 603, strong language to the effect that the Seventh Amendment perpetuated jury procedures as they existed in 1791. However prior to Dimick v. Schiedt, the entire development of this area was to the effect that the constitutional conception of jury trial is not inflexible in all details, so long as the essential elements of the institution are preserved. E.g., Gasoline Products Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188; Ex parte Peterson, 1920, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919, and and see generally Scott, Trial by Jury and the Reform of Civil Procedure, 1918, 31 Harv. L.Rev.669. And since Dimick v. Schiedt, supra, this older line of reasoning has been reaffirmed in Galloway v. United States, 1943, 319 U.S. 372, 388-386, 63 S.Ct. 1077, 87 L.Ed. 1458. In this view, fair new procedures which tend to facilitate proper fact finding are allowable although not traditional." *(528-529)*

In *Hanna v. Plumber, Massachusetts, 1965, 380 U.S. 460 at 472, 85 S.Ct. 1136 at 1144, 14 L.Ed. 2d 8,* the court said while construing the validity of service of process under federal rule which apparently was fatally defective under state court provisions:

"For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing practice and pleading in those courts, which in turn include power to regulate matters which, though falling within uncertain area between substance and procedure, are rationally capable of classification as either."

The phrase "common law" as first used in the *Seventh Amendment* was held to simply preserve the right to a trial by jury in actions involving legal rights as dis-

tinct from equitable rights *(Ross v. Bernhard, 1970, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729).*

The second usage in the amendment of the phrase "common law" simply assured that no judge or judges shall substitute their decisions on fact issues in the place and stead of the fact findings of a jury *(Baltimore and Carolina Line Inc. v. Redman, 1935, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636).*

In *Cooley v. Strickland Transportation Co., April 1, 1972, 459 F.2d 779,* the Fifth Circuit Court En Banc upheld the validity of a similar District Court Rule. Part of this same court in *1969* decided the case of *Fox v. United States, 417 F.2d 84,* relied upon by petitioner.

Johnson v. Louisiana, May 22, 1972, 406 U.S. 356, 92 S.Ct. ....., 32 L.Ed. (2d) 152, and *Apodaca v. Oregon, May 22, 1972, 406 U.S. 404, 92 S.Ct. ....., 32 L.Ed.(2) 184,* upheld the validity of state statutes authorizing less-than-unanimous verdicts in criminal cases. Apparently the state laws were conceded by the appellant to be constitutionally valid insofar as the *Seventh Amendment* was concerned in view of *Duncan v. Louisiana, infra.*

We repeat that when we consider that the framers of our Constitution phrased the *Seventh Amendment* in general terms, and used general language, and refrained from prescribing details that would be binding upon all future generations; and when we consider the decision in *Williams v. State of Florida* in its proper

perspective, the conclusions drawn by petitioner are simply not warranted.

PLACING WILLIAMS-STATE OF FLORIDA IN ITS PROPER PERSPECTIVE

Prior to the decision of the Supreme Court of the United States in *Williams vs. State of Florida, June 22, 1970, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* no case presented the precise, specific issue of whether or not the scope of the right of trial by jury guaranteed in criminal cases by the *Sixth Amendment,* or in civil cases by the *Seventh Amendment,* required the number of jurors to be fixed precisely at twelve. We find the *Williams* case to be of particular significance since it did involve the right of trial by jury in a criminal case. Certainly, if the language fo the Constitution cannot be construed as requiring any particular number of jurors in a criminal case, it is difficult to see how it can be so construed to prescribe the number of jurors in a civil case.

Case decisions handed down shortly before *Williams-State of Florida* assist in placing that case in its proper perspective.

In *Duncan v. State of Louisiana, May 20, 1968, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491; reh. den. 392 U.S. 947, 88A S.Ct. 2270, 20 L.Ed.2d 1412,* a dissenting opinion by *Justic Harlan,* joined by *Justice Stewart,* stated in part:

"* * * If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every sub-principle is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a 'jury" means an 'impartial *jury'. I should think it equally obvious that the rule, imposed long ago in the federal courts, that 'jury' means 'jury of exactly twelve', is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts, although unanimity has not been found essential to liberty in Britain, where the requirement has been abandoned." *(181, U.S.; 514, L.Ed.; 1465, S.Ct.)*

The foregoing language of *Justice Harlan* was partially utilized by the majority in *Williams-State of Florida:*

"We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'. Duncan v. Louisiana supra, at 182, 20 L.Ed2d at 514 (Harlan, J., dissenting)." *(102, U.S.; 461, L.Ed.2d; 1907, S.Ct.)*

We shall not belabor *William v. State of Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446,* which held:

> "* * * The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six. We hold that the 12 man panel is not a necessary ingredient of 'trial by jury', and that respondent's refusal to impanel more than six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the states through the Fourteenth." *(86, U.S.; 452, L.Ed.2d; 1898, S.Ct.)*

When *Williams-State of Florida,* considered in perspective, upheld the constitutional validity of a jury of six persons in a criminal case, then the validity of a district court rule requiring six jurors in civil cases should be even more clear.

Twelve jurors are required in a federal criminal trial—not because of the phraseology of the *Sixth Amendment,* but because it is expressly required by *Rule 23(b)* of the Federal Rules of Criminal Procedure. There is no such requirement in the Federal Rules of Civil Procedure.

RULE 48 F.R.C.P. DOES NOT CONTROL

Rule 83 F.R.C.P. authorizes a district court to make rules governing its practice not inconsistent with the prescribed rules of civil procedure, and to furnish copies of the district rules so promulgated to the Supreme Court. The concluding sentence of *Rule 83* provides:

> "* * * In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Some thirty-one district courts or more throughout the the nation promulgated a six-man jury rule comparable to that in Montana, and we understand they had all been filed with this court and remained on file with this court without objection *(Cooley v. Strickland, Supra, 459 F.2d at P. 785).*

The only mandate for the consistency of a jury in a civil case is found in *Rule 38(a) F.R.C.P.* which provides:

> "(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Compare the foregoing language with *Rule 23(b) F.R.Crim.P.:*

> "(b) Jury of Less than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

The foregoing language of both *Rule 38(a) F.R.C.P.* and *Rule 23(b) F.R.Crim.P.* must then be compared with *Rule 48 F.R.C.P. which provides:*

> "Juries of Less than Twelve—Majority Verdict. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict of finding of the jury."

To reach a conclusion that this rule is a mandate that a civil jury must consist of twelve persons does not

merely twist and strain the language used, but requires the insertion of language that was never in fact used. Petitioner urges that a Court cannot rewrite the rules by judicial interpretation, and then turns right around and requests the Court to do precisely just that in order to rewrite *Rule 48 F.R.C.P.* to arrive at petitioner's strained construction.

We have no doubt that when *Rule 48* was promulgated there was a general assumption that a jury required by the *Seventh Amendment* would consist of twelve persons. The same situation exactly existed with respect to the jury requirement under the *Sixth Amendment* until the precise issue was presented to this court for the first time in *Williams v. State of Florida, supra.* The cases of *Capitol Traction Co. v. Hof, 1899, 176 U.S. 1, 19 S.Ct. 580, 43 L.Ed. 873,* and *Patton v. United States, 1930, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 584,* relied upon by petitioner were discussed in *Williams v. State of Florida,* and this court did not hesitate to reject any construction based on mere unfounded assumptions such as can be found in those cases. This is the first occasion presented to this court for deciding the precise issue of whether or not the *Seventh Amendment* requires that a federal civil jury must consist of twelve persons. There is no logical reason for a different treatment in construing the *Seventh Amendment* than was used in *Williams-State of Florida.* The historical constitutional background, coupled with the Constitutional

vesting of power in Congress to constitute and create inferior courts, coupled with the Necessary and Proper Clause, coupled with the vesting of juducial power in this court "and such inferior courts as the Congress may from time to time ordain and establish," and last, but not least, coupled with the apparently intentional, broad, general language of both the *Sixth* and *Seventh Amendments*, clearly suggest that all that is required under our Constitution in either type of case is a fair and impartial jury without regard to the number of persons.

The language of the *Seventh Amendment* does not require that a fair and impartial jury must consist of twelve persons. In the absence of an act of Congress, or a rule of this court spelling out in plain and unambiguous language that a civil action jury must consist of twelve persons, the more than thirty-one district court rules prescribing a six-man jury in civil cases do not violate any constitutional guarantees.

We are advised by counsel for one of the Amicus Curiae of their intention to rely upon the decision of *Miner v. Atlass, 1960, 363 U.S. 641, 4 L.Ed.2d 1462, 80 S.Ct. 1300,* cited and relied upon by petitioner in opposition to the position we have taken in this brief. We have no quarrel with the decision that was reached in *Miner v. Atlass.* We believe it was a sound result. It simply has no factual or legal application to this case. The de bene esse statute prescribed the only factual circumstances under which depositions could be taken, and

the only circumstances under which they could be used in an admiralty trial proceeding. The United States District Court for the Northern District of Illinois adopted a rule which in effect differed from and went beyond the statutory conditions precedent. The circuit court affirmed by this court simply held that a district court had no such power. If there was an act of Congress, or a rule promulgated by this court, requiring that a civil action jury authorized by the *Seventh Amendment* must consist of twelve persons then *Miner v. Atlass* would be applicable and controlling in this case. No such facts exist in this case.

CONCLUSION

The intention of the framers of our Constitution to preserve the ancient distinctions in civil cases between law and equity is clear, and it is apparent that there was the expressed desire to require a trial before a fair and impartial jury in civil common law actions. The framers of our Constitution foresaw the possibility of vast social and economic changes in the country which would require changes in the form required for a fair and impartial jury to properly administer justice. For that reason the framers of our Constitution very wisely spelled out a requirement for a trial by jury but did not prescribe details. Instead, the Constitution empowered the Congress to create and establish the inferior courts, to regulate their conduct, and to make any changes from

time to time as the changing social and economic conditions might require as long as a fair and impartial jury was assured.

District courts having been vested with rule making power as long as it does not contradict or conflict with the Constitution, statutes, or Supreme Court rule, and since the rules promulgated by more than thirty-one of the district courts of the United States throughout the country prescribing the number of jurors in the trial of civil cases present no such conflict, we respectfully submit that the Montana United States District Court rule was and is a valid and subsisting rule.

Again we respectfully suggest that in view of the simplicity of the only question presented that this court affirm the decision of the Ninth Circuit Court without the necessity of oral argument.

CALE CROWLEY
P. O. Box 2529
Billings, Montana 59103
Attorney for Respondent

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1442. Argued January 17, 1973—Decided June 21, 1973

Local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the Seventh Amendment requirement and the coextensive statutory requirement of 28 U. S. C. § 2072 that the right of trial by jury be preserved in suits at common law, and is not inconsistent with Fed. Rule Civ. Proc. 48 that deals only with parties' stipulations regarding jury size. Pp. 3-16.

456 F. 2d 1379, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which POWELL, J., joined. MARSHALL, J., filed a dissenting opinion, in which STEWART, J., joined. POWELL, J., filed a dissenting opinion.

sought mandamus from the Court of Appeals for the Ninth Circuit to direct respondent to impanel a 12-member jury. Petitioner contended that the local Rule (1) violated the Seventh Amendment;[2] (2) violated the statutory provision, 28 U. S. C. § 2072, that rules ". . . shall preserve the right to trial by jury as at common law and as declared by the Seventh Amendment . . .";[3] and (3) was rendered invalid by Rule 83 of the Federal Rules of Civil Procedure because "inconsistent with" Fed. Rule Civ. Proc. 48 that provides for juries of less than 12 when stipulated by the parties.[4] The Court of Appeals found no merit in these contentions, sustained the validity of Local Rule 13 (d)(1), and denied

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[2] The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

State court decisions have usually turned on the interpretation of state constitutional provisions. See Ann., 47 A. L. R. 3d 895 (1973).

[3] 28 U. S. C. § 2072 provides:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions."

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

[4] Rule 48, Federal Rules of Civil Procedure, provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Rule 83, Federal Rules of Civil Procedure, provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

the writ, 456 F. 2d 1379 (1972). We granted certiorari, 409 U. S. 841 (1972). We affirm.

I

In *Williams* v. *Florida*, 399 U. S. 78 (1970), the Court sustained the constitutionality of a Florida statute providing for six-member juries in certain criminal cases. The constitutional challenge rejected in that case relied on the guarantees of jury trial secured the accused by Art. III, § 2, cl. 3, of the Constitution and by the Sixth Amendment.[5] We expressly reserved, however, the question whether "additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation" with respect to jury trial in civil cases. 399 U. S., at 92, n. 30. We conclude that they do not.

The pertinent words of the Seventh Amendment are: "In suits at common law . . . the right of trial by jury shall be preserved . . . ."[6] On its face, this language

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[5] Art. III, § 2, cl. 3, provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[6] The reference to "common law" contained in the second clause of the Seventh Amendment is irrelevant to our present inquiry because it deals exclusively with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through

is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely, "suits at common law." And while it is true that "[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,"[7] the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated not by concern for preservation of jury characteristics at common law but by fear that the civil jury itself would be abolished unless protected in express words. Almost a century and a half ago, this Court recognized that "[o]ne of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433, 446 (1830). But the omission of a protective clause from the Constitution was not because an effort was not made to include one. On the contrary, a proposal was made to include a provision in the Constitution to guarantee the right of trial by jury in civil cases but the proposal failed because the States varied widely as to the cases in which civil jury trial was provided, and the proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices.[8] The

judicial reexamination of factfindings of a jury other than as permitted in 1791. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935); *Parsons* v. *Bedford*, 28 U. S. (3 Pet.) 433, 447–448 (1830); 5 Moore's Federal Practice ¶ 38.08, at 86–90 (2d ed. 1971).

[7] Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 291 (1966).

[8] See 2 M. Farrand, Records of the Federal Convention 587 (1911). See also Henderson, *supra*, n. 7, at 292–294.

The question of a provision for the protection of the right to trial by jury in civil cases apparently was not presented at the Constitutional Convention until a proposed final draft of the Constitution was

strong pressures for a civil jury provision in the Bill of Rights encountered the same difficulty. Thus, it was agreed that, with no federal practice to draw on and

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reported out of the Committee on Style and Arrangement. At that point, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." 2 M. Farrand, *supra*, at 587. This provoked the following discussion:

"Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

"Mr. Gerry urged the necessity of Juries to guard [against] corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

"Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had prefaced with a Bill of Rights, & would second a Motion if made for the purpose . . . ." *Ibid.*

Three days later, a proposal was made by Mr. Gerry and Mr. Pinckney to add the following language to the Art. III guarantee of trial by jury in criminal cases: "And a trial by jury shall be preserved as usual in civil cases." This proposal prompted the following reaction:

"Mr. Gorham. The constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States.

"Mr. King urged the same objections.

"Genl. Pinckney. He thought such a clause in the Constitution would be pregnant with embarrassments.

"The motion was disagreed to nem. con." *Id.*, at 628.

James Wilson of Pennsylvania defended the omission at the Pennsylvania Convention convened to ratify the Constitution:

"The cases open to a jury, different in different states; it was therefore impracticable, on that ground, to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that 'the trial by jury shall be as heretofore:' since there has never been any federal system of jurisprudence, to which the declaration could relate. Besides it is not in all cases that the trial by jury is adopted in civil questions: for causes depending in courts of admiralty, such as relate to maritime captures,

since state practices varied so widely, any compromising language would necessarily have to be general. As a result, although the Seventh Amendment achieved the primary goal of jury trial adherents to incorporate an explicit constitutional protection of the right of trial by jury in civil cases, the right was limited in general words to "suits at common law." [9] We can only conclude,

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and such as are agitated in the courts of equity, do not require the intervention of that tribunal. How, then, was the line of distiction to be drawn? The convention found the task too difficult for them; and they left the business as it stands—in the fullest confidence, that no danger could possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people: and the oppression of government is effectively barred, by declaring that in all criminal cases, the trial by jury shall be preserved." 3 M. Farand, Records of the Federal Convention 101 (1911).

A proponent of a guarantee responded:

"The second and most important objection to the federal plan, which Mr. Wilson pretends to be made in a disingenuous form, is the entire abolition of the trial by jury in civil cases. It seems to me that Mr. Wilson's pretended answer is much more disingenuous than the objection itself . . . . He says, 'that the cases open to trial by jury differing in the different States, it was therefore impracticable to have made a general rule.' This answer is extremely futile, because a reference might easily have been made to the common law of England, which obtains through every State, and cases in the maritime and civil law courts would, of course, be excepted . . . ." Quoted in Henderson, *supra*, n. 7, at 296-297. See also I J. Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (2d ed. 1836).

[9] That the words "common law" were used merely to establish a general rule of trial by jury in civil cases was the view of Justice Story in the discussion in his Commentaries of the Seventh Amendment and the Judiciary Act of 1789:

"The phrase, 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made, or

therefore, that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury.[10] In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers "to equate the constitutional and common-law characteristics of the jury." 399 U. S., at 99.

Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . ." *Baltimore & Carolina Line, Inc.* v. *Red-*

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which shall be made under their authority,' &c., and 'to all cases of *admiralty and maritime jurisdiction*.' It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires, that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present to the minds of the framers of the amendment. By *common law* they meant, what the constitution denominated in the third article 'law' . . . . And congress seem to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, [which was contemporaneous with the proposal of this amendment;] . . . ." 3 J. Story, Commentaries on the Constitution of the United States 654–646 (L. Levy ed. 1970).

[10] Constitutional history does not reveal a single instance where concern was expressed for preservation of the traditional number 12. Indeed, James Wilson of Pennsylvania, a member of the Constitutional Congress and later a Justice of this Court, stated: "When I speak of juries, I feel no peculiar predilection for the number twelve . . . ." II J. Andrews, The Works of James Wilson 503 (McCloskey ed. 1967).

man, 295 U. S. 654, 657 (1935).[11] The Amendment therefore does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791," *Galloway* v. *United States*, 319 U. S. 372, 390 (1943); see also *Ex parte Peterson*, 253 U. S. 300, 309 (1920); *Walker* v. *New Mexico & S. Pac. R. Co.*, 165 U. S. 593, 596 (1897), and "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . ." *Ex parte Peterson*, *supra*, at 309–310; *Funk* v. *United States*, 290 U. S. 371, 382 (1933).

Our inquiry turns then to whether a jury of 12 is of the substance of the common law right of trial by jury. Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, *supra*, at 100, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co.* v. *Champlin Co.*, 283 U. S. 494, 498 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that "the reliability of the jury as a factfinder . . . [is] a function of its size," 399 U. S., at 100–101, and

[11] See also Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671–672 (1918):

"Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form."

nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it can not be said that 12 members is a substantive aspect of the right of trial by jury.

It is true, of course, that several earlier decisions of this Court have made the statement that "trial by jury" means "a trial by a jury of twelve . . . ." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13 (1899); see also *American Publishing Co.* v. *Fisher*, 166 U. S. 464 (1897); *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900). But in each case, the reference to "a jury of twelve" was clearly dictum and not a decision upon a question presented or litigated. Thus, in *Capital Traction Co.* v. *Hof*, *supra*, the case most often cited, the question presented was whether a civil action brought before a justice of the peace of the District of Columbia was triable by jury, and that question turned on whether the justice of the peace was a judge empowered to instruct them on the law and advise them on the facts. Insofar as the *Hof* statement implied that the Seventh Amendment required a jury of 12, it was at best an assumption. And even if that assumption had support in common law doctrine,[12] our canvass of the relevant constitutional history, like the history canvassed in *Williams* concerning the criminal jury, "casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law . . . then it was necessarily preserved in the Constitution." 399 U. S., at 92–93. We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents.[13]

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[12] Although *Williams* proceeded on the premise that the common law jury was composed of 12 members, juries of less than 12 were common in this country throughout colonial times. See the cases and statutes cited in Fisher, *supra*, n. 1, at 529–532.

[13] See Devitt, The Six-Man Jury in the Federal Court, 53 F. R. D. 273, 274 (1971); Augelli, Six Member Juries in Civil Actions in the